Supreme Court, U.S.
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No. ____ 95-46 JUL 1 1 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SHELDON I. MATZKIN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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July 10, 1995

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QUESTIONS PRESENTED

In this Court's seminal ruling in *Strickland* v. *Washington*, 466 U.S. 668 (1984), it established a two-prong test for determining when a claim of ineffective assistance of counsel may be credited. This case raises the following two questions:

1. Whether prejudice on direct appeal satisfies the "prejudice" prong of the ineffective assistance of counsel standard set forth in *Strickland*.

2. Whether, to establish prejudice under *Strickland*, the defendant must disprove the possibility that the jury "could have" convicted him in the absence of counsel's errors.

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IN THE

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OCTOBER TERM, 1995

SHELDON I. MATZKIN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sheldon I. Matzkin ("Matzkin") respectfully submits that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on April 12, 1995, affirming the denial of Matzkin's motion pursuant to 28 U.S.C. § 2255 (1994).

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) is unreported; the opinion and order of the district court (App. 3a-6a) are unreported; the opinion of the court of appeals affirming Matzkin's conviction on direct appeal is reported at 14 F.3d 1014 and is reprinted in the Appendix hereto at 7a-21a; the opinion and order of the district court deny-

ing Matzkin's motion for a new trial (App. 22a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals of which petitioner seeks review was entered on April 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Section 3282 of Title 18, United States Code (1994), provides: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

STATEMENT OF THE CASE

Procedural History of This Action

On October 14, 1992, Sheldon I. Matzkin was indicted by a grand jury sitting in the Eastern District of Virginia. The indictment charged that Matzkin, an attorney practicing in the Washington, D.C. area, had paid Navy engineer Stuart Berlin for information concerning three Navy procurements in which Matzkin's clients were bidders. Count 1 of the indictment charged that Matzkin and Berlin engaged in a conspiracy spanning nine years—"[f]rom in or about 1979 through on or about June 14, 1988"—the objects of which were to defraud

and commit offenses against the United States. Indictment at 7. The offenses that Matzkin allegedly conspired to commit were charged separately in Counts 2 (bribery), 3 (bribery), and 4 (conversion) of the indictment. *Id.* at 16-20.

The statute of limitations applicable to all counts of the indictment was five years. 18 U.S.C. § 3282 (1994). Of the 26 overt acts alleged in Count 1, only ten alleged conduct occurring within the limitations period—that is, on or after October 14, 1987. The evidence at trial established that one of those ten overt acts occurred outside the limitations period. Of all the overt acts alleged to have occurred within the statute of limitations, only one charged conduct independent of the allegations in Counts 2, 3, and 4.

Matzkin's trial began on January 11, 1993. Matzkin's trial counsel, Thomas R. Dyson ("Dyson"), did not request a jury instruction on Count 1 of the indictment that the government was required to prove that at least one overt act occurred within the statute of limitations period.[1] The district court did not give a statute of limitations instruction. Instead, the court instructed the jury—three times—that it could convict Matzkin on Count 1 if it found "at least one of the overt acts charged in the indictment *at or about the time and place alleged.*" Transcript ("T.") 1/13/247 (emphasis added); *see* T. 1/13/244, 248. Dyson did not object to these instructions or to the lack of a statute of limitations instruction. T. 1/13/263.

The jury found Matzkin not guilty of Counts 2, 3, and 4, all the substantive counts of the indictment. The jury found Matzkin guilty of Count 1, the conspiracy count.

On January 29, 1993, Matzkin moved for a new trial, contending, *inter alia*, that Dyson's representation of Matzkin at

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[1] To satisfy the statute of limitations on a conspiracy charge under 18 U.S.C. § 371 (1994), the government must allege and prove an overt act in furtherance of the conspiracy within five years of the date of indictment. *See, e.g., Grunewald* v. *United States*, 353 U.S. 391, 396-97 & n.9 (1957); *United States* v. *Head*, 641 F.2d 174, 177 (4th Cir. 1981).

trial had been ineffective because of his failure to raise the statute of limitations issue by either requesting an appropriate instruction or objecting to the court's failure to give such an instruction. In support of that motion, Dyson submitted a sworn declaration (the "Dyson Declaration") acknowledging that his failure to assert Matzkin's rights under the statute of limitations or to request a jury instruction on that issue was the "product of an oversight." *See* Dyson Declaration ¶ 5. Dyson stated that he had "made no strategic or tactical decision to waive, relinquish or otherwise refrain from asserting defendant's rights under the statute of limitations," *id.*, and that "[a]t no time did I discuss with Mr. Matzkin either the statute of limitations or any strategic or tactical reasons for waiving or failing to assert its protections," *id.* ¶ 6. Dyson admitted that "my failure to perceive the statute of limitations issue and to request a jury instruction regarding the need to find an overt act within the limitations period rendered my assistance of Mr. Matzkin ineffective." *Id.* ¶ 8.[2] The United States, in opposing the motion, did not take issue with the truth of the Dyson Declaration and did not (and, to this time, does not) maintain that the failure of counsel to request the instruction was, to any extent, tactically rooted.

By order of February 18, 1993, the district court denied Matzkin's motion for a new trial, finding that Matzkin had waived the statute of limitations defense by his failure to object to the court's omission of the limitations issue from its charge. Order of Feb. 18, 1993, at 4, 7. (App. 23a) The court did not reach the merits of the ineffective assistance of counsel issue. On March 12, 1993, the district court sentenced Matzkin to 33 months' incarceration, a two-year term of supervised release, a fine of $30,000, and a $50 special assessment.

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[2] Dyson, a trial lawyer with 30 years of experience, stated that "I have never before asserted that my performance as counsel fell short of the effective assistance to which a criminal defendant is entitled." Dyson Declaration ¶ 9.

On direct appeal from the denial of Matzkin's motion for a new trial, the United States Court of Appeals for the Fourth Circuit affirmed Matzkin's conviction. *United States* v. *Matzkin*, 14 F.3d 1014 (4th Cir. 1994). (App. 9a) The court of appeals (like the district court) declined to address the merits of Matzkin's ineffective assistance of counsel claim; instead, the court directed Matzkin to pursue such a claim by motion under 28 U.S.C. § 2255. *Id.* at 1017. (App. 12a) The court also found no "plain error" by the trial judge. *Id.* at 1018. (App. 13a)

Matzkin's Motion Pursuant to 28 U.S.C. § 2255

On February 22, 1994, Matzkin filed a motion pursuant to 28 U.S.C. § 2255 to vacate the judgment and sentence entered against him based on ineffective assistance of counsel. Matzkin's motion addressed the two-prong standard of *Strickland* v. *Washington*, 466 U.S. 668 (1984), arguing that Dyson's performance had been deficient and that Matzkin had been prejudiced as a result of that deficient performance.

In support of his argument that Dyson's performance fell below an objective standard of reasonableness under *Strickland*, Matzkin offered the Dyson Declaration and an affidavit from Richard A. Hibey, Esq., an expert criminal defense attorney who had reviewed the trial and appellate record in the case. Hibey's opinion was that Dyson's failure to request the instruction "rendered his performance in Mr. Matzkin's defense of the conspiracy count *inexcusably ineffective*." Affidavit of Richard A. Hibey, Esq., sworn to February 22, 1994, at 3 (emphasis added). Hibey noted the well-established principle that to be convicted of conspiracy, a defendant must be found beyond a reasonable doubt to have committed an overt act in furtherance of that conspiracy within the five-year federal statute of limitations. *Id.* at 3. Since Dyson admittedly "completely missed" the timeliness issue, *id.*, Hibey concluded, Dyson "never exercised any judgment with respect to the relevance, importance, strategic value and use associated

with the [statute of limitations] instruction to which his client was entitled as a matter of law," *id.* at 4. In Hibey's opinion, "a lawyer competently defending the conspiracy count in this case had to have requested the limitations instruction." *Id.* at 5.[3] The government presented no expert affidavit or other evidence contravening either the Hibey Affidavit or the Dyson Declaration.

To satisfy the prejudice prong of *Strickland*, Matzkin contended that Dyson's error had prejudiced him at trial because Matzkin's acquittal on the three substantive counts, which embraced *all but one* of the 26 overt acts charged in the conspiracy count, strongly suggested that the government had not convinced the jury that the overt acts within the limitations period had occurred. Matzkin also argued that he had been prejudiced on direct appeal by Dyson's errors at trial, noting that a district court's failure to give a statute of limitations instruction under similar facts had required reversal of the defendant's conviction in *United States* v. *Head, supra*, 641 F.2d 174. Matzkin relied, as well, on *Government of the Virgin Islands* v. *Forte*, 865 F.2d 59 (3d Cir. 1989), which held that prejudice suffered by the defendant on direct appeal as a result of trial counsel's failure to object to the prosecutor's use of peremptory challenges to remove white jurors satisfied the *Strickland* standard.

The Decision of the District Court

By Opinion and Order dated March 22, 1994, the district court denied Matzkin's § 2255 motion. The district court stated that Dyson had mounted an "all-or-nothing" trial strat-

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[3] Several courts have concluded that the failure of a defense attorney to assert a statute of limitations defense may constitute ineffective assistance of counsel. *See, e.g.*, *People* v. *Gwinn*, 627 N.E.2d 699, 702 (Ill. App. Ct. 1994); *People* v. *Sifford*, 617 N.E.2d 499, 501-02 (Ill. App. Ct. 1993), *appeal denied*, 645 N.E.2d 1366 (Ill. 1994); *Commonwealth* v. *Purcell*, 589 A.2d 217, 233-35 (Pa. Super. Ct. 1991), *appeal denied*, 604 A.2d 248 (Pa. 1992); *Morgan* v. *State*, 847 S.W.2d 538, 543-44 (Tenn. Crim. App. 1992).

egy and that "[t]he issue of whether there was a time bar was therefore not unreasonably overlooked in the manner in which the case was defended." Memorandum Opinion of March 22, 1994, at 2. (App. 4a) Nonetheless, the court assumed for purposes of the motion that Dyson's performance had been deficient. (App. 4a) In examining whether Matzkin had been prejudiced, the district court failed to apply the standard established in *Strickland*—whether there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Instead, the district court examined whether the jury "could have" based its verdict on overt acts within the limitations period. (App. 5a) Finding that the jury "could have" convicted Matzkin based on overt acts within the limitations period, the district court found that Matzkin was not deprived of a fair trial or one whose result was reliable. (*Id.*) The district court also rejected Matzkin's argument that Dyson's failure to raise the statute of limitations issue had prejudiced him on direct appeal, finding that "this is no more than a deficient performance argument in a different form." (*Id.*)

The Decision of the Court of Appeals

Matzkin timely appealed to the Court of Appeals for the Fourth Circuit. On April 12, 1995, in an unpublished, *per curiam* decision, the court of appeals "affirm[ed] [the denial of Matzkin's § 2255 motion] on the reasoning of the district court." No. 94-6369, 1995 WL 215423, at *1 (4th Cir. April 12, 1995). (App. 2a)

REASONS FOR GRANTING THE WRIT

The Sixth Amendment guarantees a criminal defendant "the Assistance of Counsel for his defence." U.S. Const. Amend. VI. This Court has long since established that the right to counsel is fundamental and essential to ensure a fair trial. *Powell* v. *Alabama*, 287 U.S. 45, 71-72 (1932); *Gideon*

v. *Wainwright*, 372 U.S. 335, 344 (1963). *See also Kimmelman* v. *Morrison*, 477 U.S. 365, 374 (1986) ("The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process.").

In *Strickland*, this Court reiterated these deeply rooted Sixth Amendment principles, emphasizing that the right to counsel is the right to effective assistance of counsel. 466 U.S. at 686. *Strickland* established a two-prong test that a defendant claiming ineffective assistance must satisfy. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. Second, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 692. To satisfy this standard, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. This articulation in *Strickland* has been recognized by this Court and lower courts as the controlling test.

On numerous occasions since *Strickland*, this Court has stressed the importance of effective assistance of counsel and has reaffirmed the test set forth in that seminal decision. *See, e.g., Kimmelman* v. *Morrison*, *supra*, 477 U.S. at 371 ("[T]his Court announced the standards to be applied to claims of constitutionally deficient representation in *Strickland* v. *Washington*. . . ."); *Lockhart* v. *Fretwell*, 113 S. Ct. 838, 842 (1993) (analyzing counsel's conduct under "the *Strickland* test"); *Nix* v. *Whiteside* 475 U.S. 157, 164 (1986). This Court has since held the right to effective assistance of counsel "may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious." *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986). *See also United States* v. *Cronic*, 466 U.S. 648, 657 n.20 (1984).

I. THE FOURTH CIRCUIT'S REFUSAL TO CONSIDER PREJUDICE ON APPEAL CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *FORTE*

The Fourth Circuit rejected Matzkin's claim that Dyson's ineffective assistance caused him to suffer prejudice on direct appeal. The Fourth Circuit's action squarely conflicts with the Third Circuit's decision in *Forte*, *supra*, 865 F.2d 59. This Court has not addressed whether prejudice suffered by a defendant on direct appeal—rather than at trial—can satisfy the *Strickland* prejudice requirement. This Court should resolve the conflict between the Third and the Fourth Circuits and determine whether prejudice on direct appeal satisfies the *Strickland* standard.

In *Forte*, counsel for the defendant failed to object to the prosecutor's use of peremptory challenges to excuse virtually all of the white jurors called.[4] On direct appeal, Forte argued that his judgment of conviction should be vacated because his trial counsel's failure to challenge the government's use of peremptory challenges denied him effective assistance of counsel and that the district court committed plain error by failing to recognize the issue. *See Forte*, 865 F.2d at 61. The Third Circuit —like the Fourth Circuit on Matzkin's direct appeal —held that Forte had failed to preserve his objections and that the trial judge had not committed plain error. The Third Circuit noted that Forte could raise the effectiveness claim only in a collateral proceeding under 28 U.S.C. § 2255. *See Government of the Virgin Islands* v. *Forte*, 806 F.2d 73, 77-78 (3d Cir. 1986).

Forte—like Matzkin—filed a motion under 28 U.S.C. § 2255 alleging that his counsel had been ineffective at trial

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[4] Defense counsel in *Forte* had been advised that *Batson* v. *Kentucky*, 476 U.S. 79 (1986), in which this Court held such a use of peremptory challenges unconstitutional, was then pending before the Court but nonetheless did not raise the *Batson* issue at trial. 865 F.2d at 61.

in failing to raise the *Batson* issue. The district court denied the motion, and Forte appealed. The Third Circuit, applying the *Strickland* two-part test, found that Forte's trial counsel's failure to object to the prosecutor's use of peremptory challenges was unreasonable under prevailing standards. 865 F.2d at 62. Turning to the prejudice inquiry under *Strickland*, the court found that Forte suffered no prejudice at trial. It nonetheless stated:

> "But we do not end our analysis at the trial for we think it also clear that had the objection been made Forte would have been successful on his direct appeal in having the matter remanded for a determination of whether there had been a *Batson* violation. When we rejected Forte's *Batson* claim, we did so because he had not preserved it, not because it was meritless."

865 F.2d at 64. The court held: "While we realize that ordinarily the *Strickland* principles are advanced when the contention is made that the trial cannot be relied upon to have produced a just result, we see no logical reason why they should not be applicable when the defendant was denied a just result on appeal because of the ineffectiveness of his attorney at the trial." *Id.* Because Forte had been prejudiced on direct appeal by his trial counsel's failure to preserve the *Batson* issue, the Third Circuit found that he had satisfied the second *Strickland* requirement. *See* 865 F.2d at 64-65.

The analysis of the *Forte* court is equally applicable here and should have been adopted by the Fourth Circuit. The Fourth Circuit's decision in *Head* makes clear that had Dyson objected to the district court's overt act instructions and requested an instruction on the statute of limitations, the failure by the court to give such an instruction and to limit the jury's consideration to overt acts within the limitations period would have mandated reversal on direct appeal. *See* 641 F.2d at 177-79. The only material difference between the reversal in *Head* and the affirmance on direct appeal here was Dyson's

failure to recognize and raise the limitations issue. Because it is reasonably probable that the Fourth Circuit (like the court of appeals on direct appeal in *Forte*) would have reversed Matzkin's conviction had Dyson preserved the limitations issue, Dyson's failure to raise that issue gravely prejudiced Matzkin's direct appeal. The prejudice requirement of *Strickland* is therefore satisfied. *Forte*, *supra*, 865 F.2d at 64-65.

The *Forte* court's recognition of appellate prejudice is consistent with *Strickland*, which determined that "[t]he principles governing ineffectiveness claims should apply in federal collateral proceedings *as they do on direct appeal* or in motions for a new trial." 466 U.S. at 697 (emphasis added). This Court has recognized that because direct appellate review is an integral part of the adversarial process, a defendant has a right to effective assistance of counsel on direct appeal. *See Evitts* v. *Lucey*, 469 U.S. 387 (1985). It would be anomalous to hold that a defendant whose chance of success on appeal is prejudiced by counsel's errors at trial can not satisfy *Strickland*.

Forte cannot be reconciled with the Fourth Circuit's decision in this case. This Court's review of the decision below is necessary to resolve the conflict between the Circuits regarding whether appellate prejudice satisfies the second prong of *Strickland*.

II. THE COURT OF APPEALS' REQUIREMENT THAT MATZKIN DISPROVE THE POSSIBILITY THAT THE JURY "COULD HAVE" CONVICTED MATZKIN ABSENT COUNSEL'S ERRORS CONFLICTS WITH THIS COURT'S DECISION IN *STRICKLAND* AND THAT OF OTHER CIRCUITS

The Fourth Circuit—adopting the reasoning of the district court—rejected Matzkin's contention that Dyson's errors prejudiced him at trial because it found that the jury "could have" based its verdict on three overt acts within the limitations period. *See* App. at 5a; *see id.* (court does not find that overt

act 21—which was outside the limitations period—was the only overt act "upon which the jury could have rested its verdict"). The standard the court applied to determine whether Matzkin was prejudiced flatly ignores the standard this Court articulated in *Strickland* and has consistently reaffirmed. As *Strickland* recognized,

> "[t]he governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."

466 U.S. at 695.

By requiring Matzkin to satisfy the onerous "could have" standard, the court of appeals placed itself squarely at odds with *Strickland* itself, which held that the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case" but need only show that the errors were significant enough to "undermine confidence in the outcome." 466 U.S. at 693, 694. *Strickland* explained that "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. Requiring *Matzkin* to prove that the jury "could have" relied on an overt act within the limitations period imposed on him a burden that this Court explicitly rejected in *Strickland*.

The Fourth Circuit's "could have" standard also conflicts with the repeatedly expressed view of other circuits. *See, e.g.*, *Baxter* v. *Thomas*, 45 F.3d 1501, 1512-15 (11th Cir. 1995); *Parkus* v. *Delo*, 33 F.3d 933, 938 (8th Cir. 1994); *Wade* v. *Calderon*, 29 F.3d 1312, 1323-25 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 923 (1995); *United States* v. *Thompson*, 27 F.3d 671, 675 (D.C. Cir.), *cert. denied*, 115 S. Ct. 650 (1994);

United States v. *Castro*, 26 F.3d 557, 562 (5th Cir. 1994); *Mayo* v. *Henderson*, 13 F.3d 528, 534 (2d Cir.), *cert. denied*, 115 S. Ct. 81 (1994); *Osborn* v. *Shillinger*, 861 F.2d 612, 626 (10th Cir. 1988).

The lower court's application of the wrong standard is especially egregious in this case, where the evidence was so weak that the jury failed to convict Matzkin on any of the substantive counts of the indictment. As *Strickland* stated, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." 466 U.S. at 696.

The prejudice standard adopted by the court of appeals, if left uncorrected, would erect an almost insurmountable barrier to ineffective assistance claims. The Court should grant the writ to resolve the conflict between the Fourth Circuit's decision in this case and that of *Strickland* and the numerous other circuits that have passed upon the issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: July 10, 1995
New York, New York

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-6369

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—versus—

SHELDON I. MATZKIN,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria, Albert V. Bryan, Jr., Senior District Judge. (CR-92-437-A, CA-94-206-AM)

Submitted: March 28, 1995 Decided: April 12, 1995

Before HAMILTON and WILLIAMS, *Circuit Judges*, and CHAPMAN, *Senior Circuit Judge*.

Affirmed by unpublished per curiam opinion.

John DeWitt Cline, WILLIAMS & CONNOLLY, Washington, D.C., *for Appellant*. Joseph John Aronica, Assistant United States Attorney, Jack I. Hanley, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, *for Appellee*.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Appellant appeals from the district court's order denying his 28 U.S.C. § 2255 (1988) motion. We have reviewed the record and the district court's opinion, and find no reversible error. Accordingly, we affirm on the reasoning of the district court.* *United States v. Matzkin*, Nos. CR-92-437-A, CA-94-206-AM (E.D. Va. Mar. 22, 1994). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

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* We deny Appellant's motion for release pending appeal.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CRIMINAL NO. 92-437-A

UNITED STATES OF AMERICA

—v.—

SHELDON I. MATZKIN,

Defendant.

MEMORANDUM OPINION

This action is before the court on the defendant's motion, filed pursuant to 28 U.S.C. § 2255, to vacate, set aside or correct the sentence of 33 months imposed on March 12, 1993, following a jury finding of guilt on Count 1 of a four-count indictment. Count 1 charged a conspiracy, in violation of 18 U.S.C. § 371, to defraud the United States and to commit offenses against the United States. On Counts 2, 3 and 4, which charged the substantive offenses of bribery and unauthorized conveyance, the defendant was found not guilty. The conviction on Count 1 was affirmed on appeal. *United States v. Matzkin*, No. 93-5246 (4th Cir. Feb. 1, 1994).

The basis of defendant's motion is that his trial counsel was ineffective in failing to request a statute of limitations instruction or to object to the court's failure to instruct the jury that in order to convict on the conspiracy count, the government had to prove that at least one overt act occurred within five years preceding the return of the indictment.

The government has responded in opposition to the motion, and the defendant has filed a reply to that opposition.

As the parties recognize, the question of ineffectiveness involves the two prongs set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), i.e., deficient performance and prejudice.

The defendant argues that trial counsel's admission that he did not consider the statute of limitations issue, even though he would have been entitled to an instruction on the issue if he requested it, itself establishes deficient performance. This is an over simplification of the realities of what went on at trial. The defense mounted by trial counsel was an all-or-nothing one, i.e., that there was no bribery or intent to defraud the government, much less an agreement to do so. The issue of whether there was a time bar was therefore not unreasonably overlooked in the manner in which the case was defended. And it cannot be ignored that the defense was three quarters successful. Nevertheless, the court will assume, for the purposes of the motion now before it, that counsel's performance was deficient.

It is the prejudice prong of the ineffectiveness claim that fails. Of the twenty-six overt acts charged in the indictment, ten allegedly occurred on or after October 14, 1987, the date which was five years before the return of the indictment. These ten were overt acts 6-10, 21, and 23-26. Because overt acts 7-10 and 23-26 were related to Counts 2, 3 and 4, on which the defendant was found not guilty, the defendant argues that this "strongly supports" his contention that the government did not prove those overt acts to the jury's satisfaction. The court disagrees. There is, of course, no legal incompatibility between a conviction on a conspiracy and acquittal on the object substantive offenses. Inconsistency in such verdicts can be attributed to many things, none fatal to a conviction. Nor in this case is there any factual incompatibility. This is particularly so as to overt acts 23, 24 and 25, which had to do with the increased retainer payments from Sierra for the purpose of paying Berlin. Matzkin's testimony

on the purpose of the increased payments was singularly weak. The jury could have drawn the inference, as the court did, that the increased retainers did not have the benign purpose ascribed to them by Matzkin, but were for the purpose of the passing on of information by Berlin. The timing of the increase, as alleged in overt act 26 and testified to at trial, was particularly damning, following as it did on the heels of the award of the SRQ-4 contract. Although it is true that the evidence that the increased retainer payments were to bribe Berlin came mainly from Berlin himself and the immunized witness Brown, that evidence was persuasive, on the conspiracy count, and not rendered unpersuasive by the acquittal on Count 2. The court does not find, as asserted by the defendant, that the only overt act upon which the jury could have rested its verdict was overt act 21. The relevance of this assertion, of course, is that the testimony at trial indicates that the act occurred prior to October 14, 1987, although the indictment alleged a later date.

The defendant also argues that the failure of trial counsel to object at trial to the court's overt act instruction and failure to request a statute of limitations instruction prejudiced the defendant on appeal, thus satisfying the prejudice prong of *Strickland*. In the court's view, this is no more than a deficient performance argument in a different form.

Because the court concludes that trial counsel's errors were not so serious as to deprive the defendant of a fair trial or to result in a trial whose result is not reliable, the motion to vacate, set aside or correct the March 12, 1993 sentence will be denied.

ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
March 22nd, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CRIMINAL NO. 92-437-A

UNITED STATES OF AMERICA

—v.—

SHELDON I. MATZKIN,

Defendant.

ORDER

For the reasons set forth in the Memorandum Opinion this day filed, it is

ORDERED that the motion of the defendant, filed pursuant to 28 U.S.C. § 2255, to vacate, set aside or correct the sentence imposed on March 12, 1993, is denied.

ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
March 22nd, 1994

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-5246

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

SHELDON I. MATZKIN,

Defendant-Appellant.

Appeal from the Untied States District Court
for the Eastern District of Virginia, at Alexandria,
Albert V. Bryan, Jr., Senior District Judge.
(CR-92-437-A)

Argued: October 28, 1993

Decided: February 1, 1994

Before HAMILTON, Circuit Judge,
CHAPMAN, Senior Circuit Judge and KAUFMAN, Senior
United States District Judge for the District of Maryland,
sitting by designation.

Affirmed by published opinion. Senior Judge Chapman wrote the opinion, in which Judge Hamilton and Senior Judge Kaufman joined.

COUNSEL

ARGUED: John DeWitt Cline, WILLIAMS & CONNOLLY, Washington, D.C., *for Appellant.* Jack I. Hanly, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, *for Appellee.* ON BRIEF: Thomas R. Dyson, WILLIAMS & CONNOLLY, Washington, D.C., *for Appellant.* Kenneth E. Melson, United States Attorney, Joseph J. Aronica, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, *for Appellee.*

OPINION

CHAPMAN, Senior Circuit Judge:

Following a trial by jury, Sheldon I. Matzkin was convicted on Count 1 of a four-count indictment which charged him with (Count 1) conspiracy to defraud the United States in violation of 18 U.S.C. § 371, (Counts 2 and 3) with bribery of an employee of the Department of the Navy in violation of 18 U.S.C § 201(b), and (Count 4) with converting or conveying without authority a thing of value of the United States in violation of 18 U.S.C §§ 641 and 642. He appeals his conviction and sentence presenting four issues for review: (1) Was it plain error for the trial court not to include a jury instruction on the statute of limitations in connection with Count 1; (2) was his trial counsel ineffective because he did not request a statute of limitations instruction; (3) was the conversion object (pricing information submitted by a potential con-

tractor) a thing of value and the property of the United States as required by 18 U S.C § 641; and (4) was the district court clearly erroneous when it found at sentencing that Stuart Berlin was a high level, sensitive person under United States Sentencing Guideline § 2C1.1(b)(2)(B). We find no merit in any of the appellant's exceptions, and we affirm the conviction and the sentence.

I.

Appellant Matzkin, an attorney and consultant practicing in the Washington, D. C. area, had certain defense contractors among his clients, including the NAVCOM division of Gould Inc. and the Sierra Research Division of LTV Corporation. These two clients paid Matzkin a monthly retainer, and he also billed them separately for claims work he performed for them from time to time. Appellant obtained information and assistance from his contact at the Navy Department, one Stuart Berlin. who was a supervisory engineer and branch head with responsibility for the technical aspects of major procurements. Berlin's position made it possible for him to obtain and pass to Matzkin information about the scheduling, quality and bidding related to procurements by the Navy from defense contractors, such as LTV and Gould. This information was not available to the public or to prospective contractors. Having access to this information in advance gave Matzkin's clients an advantage in preparing proposals and bids for future work with the Navy.

Beginning in late 1978 or early 1979, Matzkin began paying Berlin $200 per month for the information and assistance Berlin provided on Navy procurements in which Matzkin's clients were interested. These payments were made from the retainers Matzkin received from his clients, and the delivery of the money was made by Matzkin to Berlin at various places they arranged to meet including restaurants, coffee shops and appellant's automobile. These monthly payments to Berlin were increased to $1,000 in 1986 when he asked for addi-

tional sums for his assistance relating to the SRQ-4 project, which was a shipboard radar terminal set that received information from helicopters of enemy positions. This increase in payments to Berlin required Matzkin to have his monthly retainers increased by his clients. Berlin provided valuable information as to the bid proposals of competitors in the SRQ-4 procurement and also whether the Navy would require best-and-final offers. Berlin also sat on the CARP (Contract Award Review Panel), which recommended that the contract for the SRQ-4 units go to Matzkin's client, Sierra

Berlin testified that he and Matzkin were also involved in a Navy procurement for a tactical air navigation beacon, known as URN-25. This equipment was originally developed by Hoffman Electronics, which had been bought out by Gould, Inc. The Navy had been buying this equipment from Gould under "sole source contracts" so Gould had no competition in the supply of URN-25 and was anxious to keep this procurement as a "sole source contract." Berlin was the supervisor for the Navy engineers working on the URN-25 contract. He testified that he was paid by Matzkin over a number of years for information and assistance in maintaining these "sole source contracts" for Gould. Berlin also finished Matzkin with bid information on a competitive procurement involving aircraft identification being sought by Gould, Inc. and a competitor, Hazeltine Corporation.

Berlin was arrested and entered a plea agreement with the government. He became a primary witness for the prosecution in the present case and testified in detail as to his dealings with Matzkin as well as the information he supplied to and the payments he received from Matzkin. The jury found appellant guilty of conspiracy under Count 1 of the indictment but acquitted him on the remaining counts. At sentencing, the court increased the appellant's offense level by eight under U.S.S.G. § 2C1.1(b)(2)(B) because it found that Berlin had occupied a high level sensitive position within the meaning of the guideline.

II.

Appellant was convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. This offense was charged in Count 1 of the indictment, which is dated October 14, 1992, and sets forth 26 overt acts alleged to have been committed by Matzkin or a co-conspirator in furtherance of the purpose of the conspiracy. Of these overt acts, ten were allegedly committed within five years of the date of the indictment, and therefore within the five year statute of limitations created by 18 U.S.C. § 3282. Sixteen of the overt acts were allegedly committed prior to October 14, 1987 and are outside the statute.

In *United States v. Head,* 641 F.2d 174, 177 (4th Cir. 1981), *cert. denied,* 462 U S. 1132 (1983), we held that as a "general rule," in order to avoid the five year statute of limitations for conspiracies, the prosecution must prove an overt act in furtherance of the conspiracy committed within the limitations period. At trial, Matzkin's attorney did not request an instruction on Count 1 that the government was required to prove at least one overt act within the statute of limitations, and the trial court did not give such an instruction. The court did instruct that "at least one of the overt acts charged in the indictment at or about the time and place alleged, must be proved beyond a reasonable doubt as an essential element of the crime." Matzkin's attorney did not object to the lack of a statute of limitations instruction.

After conviction, Matzkin filed a motion for a new trial claiming (1) that the trial court committed plain error in failing to give a statute of limitations instruction on Count 1 and by instructing that the jury could convict on finding any one of the overt acts alleged, and (2) that his trial counsel was ineffective in failing to raise the statute of limitations issue by either submitting an appropriate instruction or by objecting to the court's failure to give a statute of limitations instruction. This motion was denied and Matzkin appeals.

A.

A claim of ineffective assistance of counsel should be raised by motion under 28 U.S.C. § 2255 in the district court, and not on direct appeal, unless it "conclusively appears" from the record that the defense counsel did not provide effective representation. *United States v. DeFusco,* 949 F.2d 114, 120-21 (4th Cir.), *cert. denied,* 112 S.Ct. 1703 (1992), *United States v. Fisher,* 477 F.2d 300, 302 (4th Cir. 1973); *United States v. Mandello,* 426 F.2d 1021, 1023 (4th Cir. 1970).

The present record does not conclusively demonstrate ineffective assistance of counsel. Therefore, we do not now address this issue, which may be asserted in a § 2255 *habeas* motion, if Matzkin desires.

B.

"The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases." *Biddinger v. Commissioner of Police,* 245 U.S. 128, 135 (1917). "The statute of limitations set forth in 18 U.S.C. § 3282 is not jurisdictional. It is an affirmative defense that may be waived." *United States v. Williams,* 684 F.2d 296, 299 (4th Cir. 1982) (citations omitted), *cert. denied* 459 U.S. 1110 (1983). Because the defendant did not request the statute of limitations instruction, he seeks to avoid the consequences of waiver by claiming that the failure of his attorney to request such an instruction was a forfeiture under the recent opinion in *United States v. Olano,* ___ U.S. ___, 113 S.Ct. 1770 (1993), because his failure was not an intentional relinquishment of a known right; but was the failure to make the timely assertion of that right (to request the statute of limitations charge).

Olano addresses the discretion of a court of appeals to correct error under Rule 52(b) of the Federal Rules of Criminal Procedure, which states: "(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although

they were not brought to the attention of the court." *Olano* held that under Rule 52(b) the appellate count has "a limited power to correct errors that were forfeited because not timely raised in the district court." 113 S.Ct. at 1776. The appellate court's authority under the rule is circumscribed, and before it acts, four findings must be made.

> There must be an "error" that is "plain" and that "affect[s] substantial rights." Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the Court of Appeals, and the court should not exercise that discretion unless the error " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985).

"If a legal rule was violated during the District Court proceedings, and if the defendant did not waive the rule, then there bas been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.* at 1777.

Although mere forfeiture, as opposed to waiver, does not extinguish an error under Rule 52(b), it is still necessary that such error be "plain" which is defined in *Olano* as "clear" or "obvious."

We are convinced that the alleged error in the present case was not "plain error" within the meaning of the rule. The trial court properly instructed the jury on the essential elements of the crime charged in Count 1. One such element is proof of the commission of one of the overt acts alleged in the indictment. In *United States v. Head, supra,* we held that it was error for the trial court not to give a statute of limitations instruction in a conspiracy case when the charge was thrice requested. We did not conclude that such a charge was necessary in every case or that the statute of limitations had become an essential element of conspiracy. Nor did we hold that such a charge was required without a request, or that the absence of such a charge without a request was plain error.

Nothing in *Head* changed the general rule that the statute of limitations is an affirmative defense to be raised by a defendant.

A finding of plain error when a court failed to sua sponte include an instruction relating to an affirmative defense would place an unnecessary and intolerable burden upon the trial court. If the present case involved but one alleged overt act, and there had been a serious conflict in the evidence as to whether such act was within the statutory time frame, the defendant's argument would have more substance. However, the present case involves 26 alleged overt acts, of which ten were within the five year period immediately preceding the date of the indictment, and there was ample evidence to prove a number of overt acts within the statutory period. Therefore, a statute of limitations defense would not be obvious to the trial judge or put the court on notice that it should give the jury instruction absent a request from counsel.

Because we have found no "plain error," it is not necessary that we proceed any further with the Rule 52(b) inquiry.

III.

Appellant argues that his conspiracy conviction must be reversed because his conversion of pricing information, the purpose of the conspiracy alleged in the indictment, failed to charge an offense The conversion focused on Matzkin's receipt from Berlin of information as to the amount of Hazeltine's bid on the UPM procurement (overt act 8). He contends that this pricing information was the property of Hazeltine and was not and could not qualify as "Property of the United States" so as to fall within the language of 18 U.S.C § 641, which is the federal law appellant is charged with conspiring to violate.

This statute provides in pertinent part:

> Whoever . . . knowingly converts to his own use or the use of another, or without authority, sells, conveys or

> disposes of any . . . thing of value of the United States or of any department or agency thereof, . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . .

18 U S.C. § 641 (1988).

Matzkin points out that "the Hazeltine cost proposal submitted to the Navy bore a legend identifying it as proprietary and restricting the government's use of the information," and he argued that at most, the government had only temporary custody of the Hazeltine information, which was insufficient ownership to support a § 641 charge. *See United States v. Hartec Enters, Inc.*, 967 F.2d 130, 133-34 (5th Cir. 1992); *United States v. Tana*, 618 F. Supp. 1393, 1395-97 (S.D.N.Y. 1985). The appellant's objection to this indictment was not made until after the jury verdict, and we have held:

> [A]ny review for alleged defect is to be reviewed, if at all, under a liberal standard, and "every intendment is . . . indulged in support of sufficiency." *Finn v. United States,* 256 F.2d 304, 306-07 (4th Cir. 1958). Here, the indictment simply mirrored the language of the statute in setting forth the offense charged, and charged both a criminal act and a criminal intent.
>
> An indictment that tracks the statutory language is ordinarily valid. Fed. R.Crim.P. 7; *United States v. American Waste Fibers Co.,* 809 F.2d 1044 (4th Cir. 1987). One of the principal purposes of an indictment is to apprise the accused of the charge or charges leveled against him so he can prepare his defense. *See United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985).

United States v. Fogel, 901 F.2d 23, 25 (4th Cir.) (footnote omitted), *cert. denied,* 498 U.S. 939 (1990).

In *United States v. Cobb,* 905 F.2d 784 (4th Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991), we held:

> [T]he sufficiency of an indictment should be determined by practical, as distinguished from purely technical, considerations. Does it, under all of the circumstances of the case, tell the defendant all that he needs to show for his defense, and does it so specify that with which he is charged that he will be in no danger of being a second time put in jeopardy? If so, it should be held good.

United States v. Missler, 414 F.2d 1293, 1297 (4th Cir. 1969), *cert. denied,* 397 U.S. 913, 90 S.Ct. 912, 25 L.Ed.2d 93 (1970).

905 F.2d at 790.

The Supreme Court has held that where conspiracy is the "gist of the crime" all that is necessary in the indictment is that the object of the conspiracy be set forth sufficiently to identify the offense which the defendant is charged with conspiring to commit. See *Wong Tai v. United States,* 273 U.S. 77, 81 (1927).

The present indictment charged Matzkin with knowingly and willfully conspiring

> 2. To commit offense against the United States, to wit:
>
> . . .
>
> b. conversion and unauthorized conveyance of a thing of value of the United States, having a value in excess of $100, in violation of Title 18 United States Code, Section 641.

This language clearly tracks the statutory language and overt act 8 is sufficient to advise the appellant of the charge he would face. This overt act alleges:

> 8. On or about February 25, 1988, SHELDON I. MATZKIN met with Stuart Berlin, and Berlin told MATZKIN that Gould/NavCom's initial offer on the UPM ( ) was approximately $50 million less than Hazeltine's.

Applying the liberal standard in support of sufficiency, we hold that the indictment was adequate to inform the defendant of the charges against him and that such charges are so specific that he is not in danger of being placed in jeopardy a second time. However, appellant argues that even if the language of the indictment is sufficient this information passed by Berlin to Matzkin was not "Property of the United States."

On the issue of whether Navy procurement bid information qualifies as property of the United States, we are not persuaded by *United States v. Harteck Enters., Inc., supra*, or *United States v. Tana, supra,* upon which appellant relies. In *Harteck,* the defendant was manufacturing wire panels in fulfillment of a government contract. When it sold some of these panels for scrap, prior to delivery to the government, it was charged with theft of government property under § 641. The Fifth Circuit found that the government had not demanded or accepted any of the traditional incidents of title and it would be unjust to convict the defendants of stealing property that the government did not own. The court found that the government had no more than a security interest in the wire panels.

In *Tana,* the defendants were charged with a violation of § 641 because they had converted certain manufacturing equipment which had been pledged as security for a loan from the United States Department of Commerce. The court held that this security interest was not a thing of value under the statute because the government had no claim of title, claim of possession or claim of control over the property.

Section 641 is not a theft statute nor is it a codification of the common law of larceny. It is much more inclusive because it covers unauthorized sale and conversion which the Court has defined as the "misuse or abuse of property" or its use "in an unauthorized manner." *See Morisette v. United States,* 342 U.S. 246, 272 (1952). The statute also covers both tangible and intangible property. *United States v. Girard,* 601 F.2d 69, 71 (2d Cir.), *cert. denied,* 444 U.S. 871 (1979) (defendant sold names of drug informants).

The information submitted to the Navy Department by bidders for contracts is to be kept confidential until the award of the contract has been announced. Government employees are prohibited from disclosing this information outside the government. *See* 48 C.F.R. §§ 5.401 and 15.413. These rules protect the government from bids that may be the result of collusion between or among the bidders.

Matzkin concedes that the government had custody and possession of the information, but he argues these elements of ownership are not sufficient to bring the information within the statutory meaning of "Property of the United States." However, we are persuaded by the reasoning of *United States v. Berlin,* 707 F. Supp. 832, 839-40 (E.D.Va. 1989). This case involved the same confidential information about Hazeltine's bid on the UPM ( ) contract in competition with Gould, and the court found the government had a sufficient interest in the bid information to constitute property under § 641, relying upon *United States v. Perez,* 707 F.2d 359 (8th Cir. 1983), in which it was held that the government had a sufficient property interest in $1,500 in currency, marked as a trial exhibit, to be a sufficient property interest under § 641. This currency was not subject to forfeiture, so it could not pass to the government, but the government's control over the money for the duration of the trial was a sufficient property interest under the statute. In *United States v. Bennefield,* 721 F.2d 128, 129 (4th Cir. 1983), we held that the government's temporary possession of money paid by patrons of a non-commissioned officer's club as tips before the money was distributed to club employees was sufficient to permit prosecution of an employee under § 641 who converted the tip money.

It is not necessary that the government have the sole interest in the property or that it have sole knowledge of the bid information. The bidder will always know the amount of his bid, but this does not prevent the Navy Department, which has custody of the information, from using § 641 to prosecute someone who converts to his own use or without authority sells this information to another. There can be no argument

that the amount of a confidential, competitive bid is not a thing of value. The amount of a competitor's bid would be the most valuable information that could be obtained by another bidder. In the present case, the indictment alleges that Matzkin was advised by his co-conspirator that Matzkin's client's bid was $50 million less than its main competitor. This information was of great value to the government because the unauthorized use of this bid amount would allow Matzkin's client to increase its bid by many millions and still be the low bidder on the procurement. The government has possession of this information, and it does qualify as "a thing of value of the United States" until the award of the contract is announced.

IV.

At sentencing, the district court enhanced the appellant's base offense level by eight because Berlin was in a sensitive position. The court enhanced an additional two levels because there was more than one bribe. However, the court refused the government's efforts to enhance because of defendant's role in the offense or his alleged obstruction of justice or because of the benefit-anticipated profit figures submitted by the prosecution. As to the sensitive position, the court made the following finding:

> I do think he was more than just a supervising engineer— he, being Berlin. He served on the CARP and was in a sensitive position; and his being in that position is what enabled him to give the information that he gave to Matzkin or Matzkin's client.

Appellant claims that the district court was clearly erroneous in finding Berlin to be covered by § 2C1.1(b)(2)(B) of the U.S.S.G. which provides in pertinent part:

> (b) Specific Offense Characteristics.
>
> * * *

> (2)(B) If the offense involved a payment for the purpose of influencing an elected official or any official holding a high level decision-making or sensitive position, increase by 8 levels.

Berlin was a GS-15 Navy engineer and Matzkin argues that as such he was simply a mid-level employee with no power to award contracts on his own, and although he sat on some of the review boards, he is not the type person who holds a "sensitive position" under the guidelines.

Berlin had been a supervisory engineer and branch head of a number of Navy engineers with responsibility for technical aspects of major procurements. His position enabled him to obtain and pass on to Matzkin various information including the amount of certain bids made in Navy procurements. The information Matzkin obtained from Berlin and passed along to Matzkin's clients enabled the clients to adjust their bids accordingly. If the client had bid low and received information from Berlin that his was the lowest bid by millions of dollars, he could amend his bid upward and still receive the contract. This could cost the government great sums over a period of time.

Berlin's position on CARP was sensitive. There were only three members of CARP and they made the recommendation to Navy officials on large Navy procurements. Although CARP could not make the final decision that the contracts should be awarded to a particular bidder, senior Navy officials would not likely accept the bid about a favorable report from CARP. The district court found that it was Berlin's position on this review panel that enabled him to commit the crime with Matzkin.

Appellant cites *United States v. Stephenson*, 895 F.2d 867 (2d Cir. 1990), in which the court found that the government official, who accepted bribes in return for favorably reviewing export license applications, was not in a "sensitive" position in the Commerce Department. We do not find Stephenson's position and Berlin's position comparable. Berlin was involved in decision making on multi-million dol-

lar Navy contracts and had considerable discretion and influence in these matters. He also supervised other Navy engineers. We cannot say that the finding of the district court is clearly erroneous or that its conclusion is in error.

We find no merit to appellant's claim that he should not be given the eight level enhancement because Berlin did not receive the same enhancement at the time of his sentence. The government is not required to feed Matzkin and Berlin out of the same spoon. Berlin entered a plea of guilty and it was a part of the plea agreement that he should not be considered a high level official at the time he committed the offense. Also, at the time of Matzkin's sentencing the court had much more information about Berlin's position, influence and responsibility.

For the reasons set forth above, the conviction and sentence of the appellant are affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CRIMINAL NO. 92-437-A

UNITED STATES OF AMERICA

—v.—

SHELDON I. MATZKIN,

Defendant.

MEMORANDUM OPINION AND ORDER

Following indictment and trial, the defendant, on January 15, 1993, was found guilty of a conspiracy, the objects of which were to defraud the United States, to bribe a public official, and to convey or convey without authority property of the United States (Count 1). He was acquitted of the substantive offenses of bribery (Counts 2 and 3) and conversion or conveyance without authority (Count 4).

The matter is now before the court on the defendant's motion for judgment of acquittal or for a new trial. The primary contention supporting the motion is the failure of the court to include in its conspiracy instruction the requirement that the government prove that at least one overt act was committed within five years before the indictment was returned on October 14, 1992. An additional basis is the failure of the court in its charge concerning bribery, to define "official duty" as that term is used in the bribery statute [18 U.S.C.

§ 201(b) (1) (C)] which was the subject of Counts 2 and 3 and an object of the conspiracy charged in Count 1. The motion also challenges the sufficiency of the evidence to support a finding that an overt act was committed within the five years prior to the return of the indictment.

The conspiracy charge to the jury did not include as an element to be proved by the United States that at least one of the overt acts listed in Count 1 of the indictment occurred within five years prior to October 14, 1992. Following the charge, the court called counsel to the bench and asked if there was any objection to the charge. Counsel for the defendant answered in the negative.

The court concludes that the statute of limitations is an affirmative defense which can be waived. *United States* v. *Williams*, 684 F.2d 296, 299 (4th Cir. 1982); *United States* v. *Arky*, 938 F.2d 579, 582 (5th Cir. 1991). The court further concludes that the defendant's failure to object to the court's omission of the five-year element from its charge constitutes such a waiver. In his reply brief, the defendant seems to assert that because the action is still at the trial *level*, the failure to object *at trial* to the charge distinguishes this case from those cases which hold that such an objection cannot be raised for the first time on appeal. This distinction is not a difference. The purpose of the requirement of a contemporaneous objection at trial is to give the trial judge an opportunity, before the jury begins its deliberations, to correct any error in the charge. That purpose is subverted if the objection can be delayed until after verdict and discharge of the jury.

For the same reasons the failure to define "official duty" in the charge has been waived. But more important, such a charge was unnecessary because no one at trial took the position that doing what Berlin was alleged to have done in return for the defendant's payments was proper. The defendant's position was that he made no payments to Berlin in exchange for information and that Berlin gave him no information for payment. There just was no question at trial that Berlin's giving of such information was other than a violation of what

Berlin was supposed to do. Indeed, in proclaiming his innocence, the defendant in his testimony, asserted that he repeatedly lectured his business associates on the impropriety of doing what he and Berlin were accused of doing.

As to the sufficiency of the evidence, the defendant concedes that acquittal on the substantive counts is not dispositive of whether the jury found that an overt act related to the substantive offense occurred (Memo. in Support of Motion, p. 3). Here there were ten overt acts (6-10, 21, 23-26) which fell within the five-year period. Only overt act six is unrelated to the substantive counts on which there were acquittals. This, in the court's view, does not call into question the guilty verdict on the conspiracy count, given that there was ample evidence as to overt act six, and certainly sufficient evidence as to the other overt acts. This suffiency is dispositive of the motion for judgment of acquittal. Also, the acquittal on the substantive counts persuade the court that the verdict on the conspiracy count is against the clear weight of the evidence or result in a miscarriage of justice. This is the controlling standard in passing on a motion for a new trial, and applying it results in a denial of the motion.

The defendant also asserts, as a basis for a new trial, ineffectiveness of counsel in failing to request the court to include the five-year limitation as an element of the conspiracy charge. Even if this constituted ineffective representation (and the court does not suggest that it was), it would be inappropriate to consider that assertion in this proceeding.

Accordingly, the motion for judgment of acquittal or, in the alternative, for a new trial, is denied.

And it is so ordered.

ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
February 18th, 1993